IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*
No. 8

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*
No. 23

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION BY APPELLEES THE ATCHISON, TOPEKA AND SANTA FE RY. CO., ET AL. (MOUNTAIN-PACIFIC RAILROADS) FOR LIMITED REHEARING

DOUGLAS F. SMITH
HOWARD J. TRIENENS
GEORGE L. SAUNDERS, JR.
GARY L. COWAN
Sidley & Austin
11 South La Salle Street
Chicago, Illinois 60603

Attorneys for Appellees The Atchison, Topeka and Santa Fe Ry. Co., et al.

S. R. BRITTINGHAM, JR.
CHARLES W. BURKETT
FRANK S. FARRELL
LAWRENCE W. HOBBS
THORMUND A. MILLER
ERNEST PORTER
HOWARD V. RHEDIN
HOWARD E. ROOS
L. E. TORINUS, JR.
E. L. VAN DELLEN
Of Counsel

June, 1967

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

INDEX

	PAGE
Reasons For Granting Limited Rehearing	2
I. The Court Decided This Case By Resolving Issues Not Raised by the Jurisdictional Statements and Not Briefed or Argued by Either Side	3
II. In Deciding Issues Not Briefed or Argued, The Court Erred by Relying Upon Findings of The Commission Which Are Unsupported by Substantial Evidence	3
III. The Court Has Denied Appellees Their Statutory Right To Judicial Review and Their Right To Rely Upon the Rules of This Court	7
Conclusion	11
Certificate of Counsel	12
Appendix	13

CITATIONS

CASES:

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 9, 10

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 7

Christoffel v. *United States*, 338 U.S. 84 (1949) 10

Lawn v. *United States*, 355 U.S. 339 (1958) 9

Public Service Commission of Utah v. *United States*, 356 U.S. 421 (1958) 7

Sangamon Valley Television Corp. v. *United States*, 269 F.2d 221 (D.C. Cir. 1959) 10

Service v. *Dulles*, 354 U.S. 363 (1957) 9

Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 9

PAGE

Yellin v. *United States*, 374 U.S. 109 (1963) 10

STATUTES:

Administrative Procedure Act § 10(e), 5 U.S.C. § 706 7

Rules of Practice of the Supreme Court
Rule 15(1)(c)(1) 9, 10
Rule 23(1)(c) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NOS. 8 AND 23

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 8

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 23

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PETITION BY APPELLEES THE ATCHISON, TOPEKA AND SANTA FE RY. CO., ET AL. (MOUNTAIN-PACIFIC RAILROADS) FOR LIMITED REHEARING

Appellee Mountain-Pacific railroads hereby petition the Court for a limited rehearing of its opinion and judgment in this case, and in support of said petition respectfully state the following:

REASONS FOR GRANTING LIMITED REHEARING

The Court has held that the orders of the Interstate Commerce Commission prescribing increased divisions for the Midwestern roads were made in "reliance on costs alone" (Opinion, p. 16). Under that interpretation of the Commission's reports, issues of law respecting the Commission's treatment of costs are obviously of decisive importance in judicial consideration of the Commission's orders. Such issues respecting costs were raised by the complaints of the Mountain-Pacific railroads (R. 1114, 1122-1123, 1171-1172) and stated in the "List of Issues Remaining in Controversy" filed in the district court by all parties (R. 1325, 1338-1345).

The district court, however, did not decide the cost issues, holding that it was unnecessary to discuss them in light of its conclusions on other issues related to revenue needs (R. 1733).

The Court, by upholding the Commission's orders, necessarily disposed of all cost issues. But the Court did so without any consideration whatever of a crucial aspect of those issues—namely, whether the Commission's cost findings are supported by substantial evidence. The very cost findings upon which the Court relied in its opinion were challenged as being unsupported by substantial evidence, and, as we shall show, the record does not support them. The legal issue of whether the Commission's cost findings are supported by substantial evidence has not been considered by *any* court. Unless this Court now grants rehearing with respect to that issue, appellees will be denied their statutory right to judicial review and their right to rely upon the procedural rules of this Court.

I. THE COURT DECIDED THIS CASE BY RESOLVING ISSUES NOT RAISED BY THE JURISDICTIONAL STATEMENTS AND NOT BRIEFED OR ARGUED BY EITHER SIDE.

On appeal to this Court, appellants did not raise any question with respect to the district court's reservation of the cost issues. Indeed, the Midwestern appellants stated that "appellants properly confined their questions presented to questions *actually decided* by the District Court" (C&NW Brief, p. 50, note 39) (emphasis added).

The jurisdictional statements did not present any questions related to the cost issues; the portions of the record necessary to resolve those issues were not designated for printing; and no appellant argued the merits of the cost issues in its brief. The Government did suggest, for the first time on brief, that the Court could disregard those issues as insubstantial, but it made no effort to demonstrate that this was so beyond quoting portions of the district court's opinion out of context in an effort to create the impression that the district court held such a view (U.S. Brief, pp. 61-62). Accordingly, appellees did not brief the merits of the cost issues and those issues were never mentioned at oral argument.

II. IN DECIDING ISSUES NOT BRIEFED OR ARGUED, THE COURT ERRED BY RELYING UPON FINDINGS OF THE COMMISSION WHICH ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The opinion of this Court holds "that the Commission's original and supplemental orders are valid" (Opinion, p. 39), thereby resolving against the Mountain-Pacific railroads each and every issue including all issues directed to the Commission's cost determinations. The opinion of the

Court holds that the Commission made adequate findings with respect to the two most important cost issues pertaining to the divisions of the Midwestern railroads—maintenance of way and empty return ratios (Opinion, pp. 24-25). But the opinion gives no consideration to the question of whether there is substantial evidence to support these critical findings.

The Court's holding was that the legal issues directed to costs "are so insubstantial that no useful purpose would be served by further proceedings in the District Court." But in so holding, the Court relied wholly upon the view that the Commission's "conclusions had reasoned foundation and were within the area of its expert judgment" (Opinion, p. 28). The Court did not purport to review the evidence (which was not even in the printed record before it), and consequently, it could not possibly have actually determined that there was substantial evidence in the record to support the Commission's findings on these matters.

The situation is illustrated by the treatment of maintenance of way costs. As the Court's opinion states: "The Mountain-Pacific roads claimed that [the Commission's] method unduly favored the Midwestern lines by improperly ascribing the maintenance costs of branch and light-density lines to the cost of their transcontinental traffic" (Opinion, p. 25). This claim was disposed of on the basis of the following Commission *finding* (quoted at Opinion, p. 25):

> "It is the light density on the main lines in the Midwest which causes [their] higher costs. *These lines are used by bridge traffic,* and it is, therefore, quite correct to charge this bridge traffic with its proportionate share of maintaining the lines over which it moves" (emphasis supplied).

Accepting the Court's holding that this statement constitutes a sufficient finding on the crucial issue of maintenance

of way costs, the question remains whether that finding is supported by substantial evidence.

In the district court, the appellants did not even attempt to defend the finding that all their main lines are used by bridge traffic, but, instead, took the position that the Commission did not actually rely upon that finding. Accordingly, the issue that is involved in this case with respect to the Commission's use of average maintenance of way costs has two separate parts—namely, (1) whether the statement quoted was a material finding and (2) if so, whether it was "without the support of substantial evidence".*

The first part of this issue was conclusively decided in the affirmative when this Court held that the statement quoted did constitute the basis of the Commission's decision, but the second part of the issue has never been considered either by this Court or by the court below.

The Commission's finding on which the Court relied is not supported by substantial evidence.

---

* The issue was stated in the court below as follows (R. 1341-1342):

> "25. Whether, in supporting its use of Rail Form A railroad group average out-of-pocket maintenance of way costs in its determination of cost of service, the Commission relied in any substantial part upon a finding that transcontinental traffic moves over the various categories of lines of the Midwestern railroads in the same degree as the average of all traffic; and, if so, whether such finding was arbitrary or without the support of substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act; and, if said finding was arbitrary and without the support of substantial evidence, whether that constitutes, in the circumstances of this case, a valid ground for setting aside Commission action?"

There are in the Midwest many main lines of extremely light density. The result is the light density of the *average* main line in the Midwest to which the Commission referred. But there is *no evidence whatever* that a single car of transcontinental "bridge traffic" ever used such extremely light density main lines.

To demonstrate the absence of evidence to support the Commission's finding, we attach hereto as an Appendix the relevant portion of the testimony of *appellants' own witness,* the operating officer of appellant C&NW. On the transcontinental bridge traffic at issue, the C&NW's sole function is to haul loaded cars between gateways on the east (primarily Chicago) and gateways on the west (primarily Council Bluffs or Twin Cities.) As shown in the Appendix, the traffic density over the lines between those gateways is far greater than over other C&NW lines, and, as the Commission found, the light density lines are the high cost lines. As also shown in Appendix A, the C&NW main lines of lightest density are dead-end lines to the Black Hills of South Dakota, to Lander, Wyoming, to upper Michigan, and the like. Since these dead-end lines do not connect with any Mountain-Pacific railroad, they cannot possibly carry transcontinental bridge traffic.

No appellant has ever cited any evidence to support the Commission's critical finding that such light density, high cost, dead-end main lines "are used by bridge traffic." The district court did not reach the question, and therefore never considered whether the Commission's finding was supported by substantial evidence. This Court did not have the evidence before it in the printed record, and the opinion of the Court did not purport even to consider the question of lack of substantial evidence to support the very finding upon which the Court relied.

Similarly, with respect to the disposition of the important cost factor of empty return ratios, the opinion of the Court relies upon the Commission's finding that the averages used are appropriate for "the traffic at issue" (Opinion, pp. 24-25). Again, the critical claim in the district court was that this very finding was "without support of substantial evidence" (Issue No. 24, R. 1341). The district court did not reach the issue, and this Court affirmed the Commission's orders without even considering the evidence.

III. THE COURT HAS DENIED APPELLEES THEIR STATUTORY RIGHT TO JUDICIAL REVIEW AND THEIR RIGHT TO RELY UPON THE RULES OF THIS COURT.

The right of judicial review of administrative orders to determine claims of lack of substantial evidence has been expressly granted by statute. Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706) provides that "the reviewing court shall . . : (2) hold unlawful and set aside agency . . : findings . . . found to be . . . (E) unsupported by substantial evidence . . ." This Court has squarely held that, even where expert discretion is involved, "The agency must make findings that support its decision, and *those findings must be supported by substantial evidence.*" *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962) (emphasis supplied). Findings as to costs are not exempt from this general rule. See *Public Service Commission of Utah* v. *United States,* 356 U.S. 421, 426-427 (1958).

By concluding "that there was no legal infirmity in the Commission's cost findings" (Opinion, p. 28) without considering whether the critical cost findings of the Commission were supported by substantial evidence, the Court

deprived the Mountain-Pacific railroads of their statutory right of judicial review. No judge, in the district court (because it did not reach the issue) or in this Court (because it did not purport to consider the substantiality of the evidence), has accorded the Mountain-Pacific railroads their right to judicial review of the existence of substantial evidence to support the Commission's findings.

The central hard fact, which cannot be avoided, and which in all fairness requires that this petition for limited rehearing be granted, is that no one can tell whether findings are supported by substantial evidence without looking at the evidence. If the Mountain-Pacific railroads are not entitled to have some court at some time actually review the record, the statutory right to judicial review becomes meaningless.

These issues are not peripheral or collateral, but go to the heart of the cost controversy before the Commission. If substantial evidence is lacking, the justification for an increase in the Midwestern railroads' divisions disappears, particularly with respect to their divisions as bridge carriers of Official-transcontinental traffic. Yet the Mountain-Pacific railroads have been denied judicial review of the claimed lack of substantial evidence to support the Commission's critical cost findings. The district court reserved the cost issues on the ground that the Commission's orders were not based solely on costs and were otherwise unlawful. Appellants have now convinced this Court that the Commission's orders were based solely upon costs, but they have made no effort to show that the Commission's cost findings are actually supported by substantial evidence. No court has considered the claim that the Commission's cost findings are not supported by substantial evidence.

The reason this has happened, and the only way in which it could have happened, is that, in passing upon the cost issues reserved by the district court, even though those issues were not raised by either group of appellants in their Jurisdictional Statements, the Court has acted contrary to its own Rules. Rule 15(1)(c)(1) of the Court's Rules is explicit in its requirement that issues to be decided on an appeal must be set forth in the questions presented in the Jurisdictional Statement. And that Rule is equally explicit in providing that questions not so presented will not be decided.

> "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."*

There can be no doubt that the cost issues here were neither set forth in the jurisdictional statements nor fairly comprised therein. A mere reading of the questions presented in the jurisdictional statements makes that clear, *and neither group of appellants has ever suggested otherwise.*

It has long been established that procedural rules, even though subject to change, must be observed so long as they are in effect. *Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), is a clear application of the rule to executive agencies, and the Court has repeatedly had occasion to enforce it. See, e.g., *Service* v. *Dulles,* 354 U.S. 363 (1957); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959). The Court has applied the same rule to actions by legislative committees in violation

---

* In dealing with the almost identical language of Rule 23(1)(c), relating to questions presented in a petition for certiorari, the Court has indicated that this language means what it says. *Lawn* v. *United States,* 355 U.S. 339, 363, note 16 (1958).

of their procedural rules. See *Christoffel* v. *United States*, 338 U.S. 84 (1949); *Yellin* v. *United States*, 374 U.S. 109 (1963). And lower courts have applied the rule to instances in which administrative agencies have not observed their rules of procedure. E.g., *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959).

We submit that the principle of such cases requires that the courts also observe their procedural rules. The obvious purpose of the *Accardi* v. *Shaughnessy* principle is to guarantee fairness to the parties. Certainly, any party to a proceeding is entitled to know and rely upon the rules under which that proceeding is to be conducted, so that he may have the opportunity to protect his interests. This necessity is not limited to executive, legislative and administrative proceedings, but, indeed, is most acute in judicial proceedings, particularly proceedings in this Court, whose decisions have a finality beyond that given to the actions of any other branch or department of Government.

The Court's opinion refers to the policy it has previously followed of not reviewing an administrative record in the first instance and explains its departure from that policy largely in terms of the long period since this case was initiated (Opinion, pp. 27-28). We do not question that such a consideration is relevant where the issue before the Court is one of a policy designed merely to serve its own convenience. But the question here is not one of mere policy. If the Court adheres to that portion of its opinion in this case, the result will be that the administrative record respecting costs will not be reviewed by *any* court. As already noted, this would deprive us of our plain statutory right to judicial review. And it would also deprive us of our rights under the Court's own Rules. Rule 15(1)(c)(1) leaves no doubt of the right of the parties to be apprised

of the issues to be decided by the Court. Under that Rule, the parties are entitled to know the issues to be decided in every case, so that they can present their arguments and direct the Court's attention to the relevant portions of the record. We have been denied that right in this case.

CONCLUSION

For the foregoing reasons, this petition for limited rehearing should be granted and the case should either be remanded to the district court for judicial review of the question of whether the Commission's cost findings are supported by substantial evidence, or set down for further briefs and argument on that issue in this Court.

Respectfully submitted,

DOUGLAS F. SMITH
HOWARD J. TRIENENS
GEORGE L. SAUNDERS, JR.
GARY L. COWAN
Sidley & Austin
11 South La Salle Street
Chicago, Illinois 60603

Attorneys for Appellees
The Atchison, Topeka and Santa Fe Ry. Co., et al.

S. R. BRITTINGHAM, JR.
CHARLES W. BURKETT
FRANK S. FARRELL
LAWRENCE W. HOBBS
THORMUND A. MILLER
ERNEST PORTER
HOWARD V. RHEDIN
HOWARD E. ROOS
L. E. TORINUS, JR.
E. L. VAN DELLEN

Of Counsel

June, 1967

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58(2) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/ .....
Howard J. Trienens

APPENDIX

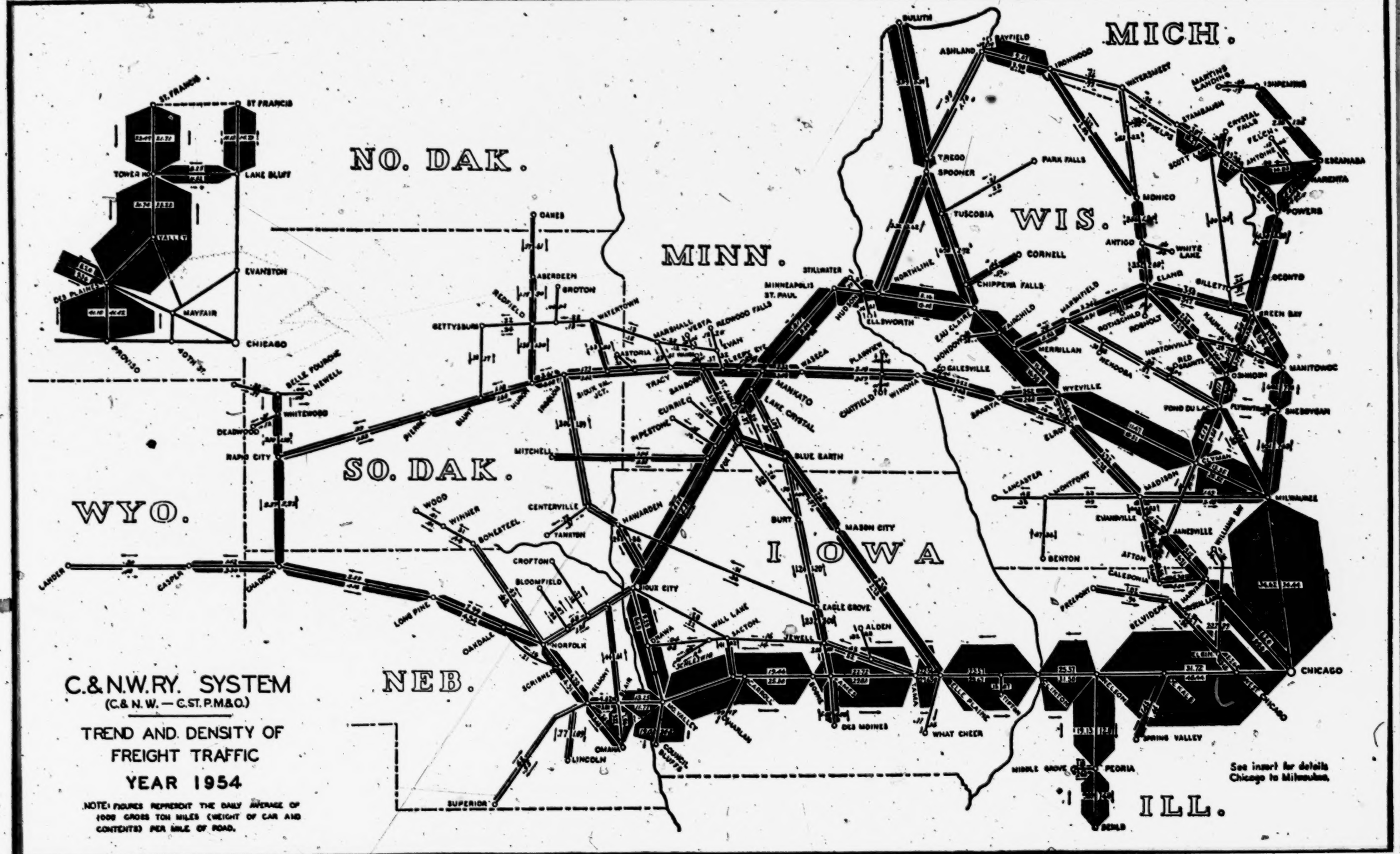
EXHIBIT MW-123: TESTIMONY OF J. C. FULLMER, GENERAL SUPERINTENDENT TRANSPORTATION, C. & N. W. RY. SYSTEM

There are numerous main, secondary and branch lines [in the Chicago and North Western System] in addition to the main lines indicated. Among the principal main lines are those running from Council Bluffs and Omaha to the Twin Cities of Minneapolis and St. Paul; one extending west from Elroy, Wisconsin, to Rapid City and Belle Fourche, South Dakota. Another main line extends from Omaha west to Rapid City via Chadron, Nebraska, to a connection with the last mentioned line at Rapid City, and with an extension from Dakota Junction (near Chadron) to Casper and Lander, Wyoming. These main lines through the sparsely populated states of Nebraska, South Dakota and Wyoming serve a territory the eastern part of which is devoted largely to agriculture and the western part to the raising of livestock. Consequently, the traffic on these lines is quite light. As examples, in 1954, the average thousand gross ton miles per mile of road per day were as follows:

		Mileage
Long Pine, Nebraska to Chadron	7.75	181.8
Chadron to Rapid City	4.81	104.7
Chadron to Casper	3.72	192.5
Casper to Lander	.78	150.4
Brookings (near east boundary of South Dakota) to Rapid City	4.36	358.8
Rapid City to Belle Fourche	3.72	54.4

These figures state the sum of the tonnage in both directions.

In addition, the North Western System includes a veritable grid of secondary, main and branch lines which are shown graphically on the map submitted in this proceeding in connection with the testimony of Mr. R. O. Small. The very light traffic density of these lines is shown graphically on the density chart attached to this statement, Appendix-A.



C.&N.W.RY. SYSTEM
(C.& N. W. — C.ST.P.M.&O.)

TREND AND DENSITY OF FREIGHT TRAFFIC

YEAR 1954